Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

RICK HUCKABY and JERI BOYD,

Petitioners,

v.

PENNSYLVANIA GENERAL INSURANCE COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Despite any limitation or condition in a liability policy, clear and unambiguous federal statutes and regulations require an overriding policy endorsement that allows each judgment against a trucker, arising from multiple-vehicle-claimant crashes, to be collected from the trucker's insurance company for at least regulatory amounts. Several circuit and other appellate courts so construe these statutes, regulations and endorsements. Yet, when it is necessary to enforce these statutes, regulations and endorsements, federal courts improperly disallow the collection of multiple-vehicle-claimant judgments from an insurance company when they exceed the initial liability limits in its policy. As clearly intended by Congress for multiple-vehicle-claimant crashes, and for at least the amounts stated in the regulations, will the Supreme Court uphold collection from an insurance company of each judgment against its insured trucker?

2. Will the Supreme Court resolve conflicting opinions, between and within federal circuit courts, about the subject statutes, regulations and endorsements, and rule that each judgment against a trucker in multiple-vehicle-claimant crashes may be collected from his or her insurance company for at least the regulatory amounts?

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Authorities iii

Other Court Opinions 1

Jurisdiction 1

Statutory Provisions 1

Statement of the Case 2

Reasons to Allow Writ of Certiorari 6

Standard of Review 7

Conclusion 13

Appendix ..... App. i

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 7

Canal Insurance Company v. First General Insurance Company, 889 F.2d 604 (5th Cir. 1989) 7, 8

Empire Fire and Marine Insurance Company v. Guaranty National Insurance Company, 868 F.2d 357 (10th Cir. 1989).....10, 11

Hamm v. Canal Insurance Company, 10 F. Supp.2d 539 (M.D.N.C. 1998) *affirmed* 178 F.3d 1283 (4th Cir. 1999) 12

Hines v. Davidowitz, 312 U.S 52 (1941)..... 7

Industrial Indemnity Company v. Truax Truck Line, Inc., 45 F.3d 986 (5th Cir. 1995)..... 9

Kaplan v. Harco National Insurance Company, 716 So.2d 673 (Miss. App. 1998), *cert. denied*, 726 So.2d 594 (Miss. 1998)..... 9

Lubbock County Hospital District v. National Union Fire Insurance Company, 143 F.3d 239 (5th Cir. 1998)..... 8

National Union Fire v. Hudson Energy Company, 811 S. W. 2d 552 (Tex. 1991)..... 7

Redland Insurance Company v. Shelter General Insurance Companies, 121 F.3d 443 (8th Cir. 1997)..... 9

Sharp v. State Farm Fire and Casualty Company, 115 F.3d 1258 (5th Cir. 1997)..... 7

United States v. Locke, 120 S. Ct. 1135 (2000)..... 7

TABLE OF AUTHORITIES – Continued

Page

STATUTES

49 C.F.R. §§ 387.7, 387.9, 387.15 ..... 2, 10

28 U.S.C.A. § 1254(1) and 1257(a) 1

28 U.S.C.A. §§ 1291, 1331 2

28 U.S.C.A. § 2106 2

49 U.S.C.A. § 13906(a) 1, 10

MISCELLANEOUS

National Highway Traffic Safety Administration Report (1999) Website *http://www.saferoads.org/facts/fs-trucks.html* 7

OTHER COURT OPINIONS

The unpublished opinions of the district and circuit court are in the appendix. They are by judges for the United States District Court for the Southern and Eastern Divisions of Texas and the 5th Circuit Court of Appeals at New Orleans, Louisiana.

JURISDICTION

In a declaratory judgment action, the final summary judgment here for review is signed on September 30, 1999. A notice of appeal from it is timely filed on October 5, 1999. The opinion and judgment of the 5th Circuit panel are dated July 3, 2000. A timely petition for rehearing *en banc* by the 5th Circuit is denied on August 2, 2000. The petition for rehearing *en banc is* also treated as a petition for panel rehearing, and it is similarly denied on August 2, 2000. The 90th subsequent calendar day allowed, to timely file a petition for writ of certiorari in the Supreme Court, is October 31, 2000. The Supreme Court has jurisdiction of this case pursuant to 28 U.S.C.A. §§ 1254(1) and 1257(a).

STATUTORY PROVISIONS

49 U.S.C.A. § 13906(a). Security of motor carriers, brokers, and freight forwarders-Motor carrier requirements. –

(1) Liability insurance requirement. – The Secretary may register a motor carrier under section 13902 only if the

registrant files with a Secretary a bond, insurance policy, or other type of security approved by the Secretary, in an amount not less than such amount as the Secretary prescribes pursuant to, or as is required by, sections 31138 and 31139, and the laws of the State or States in which the registrant is operating, to the extent applicable. **The security must be sufficient to pay**, not more than the amount of the security, **for each final judgment against the registrant** for bodily injury to, or death of, an individual resulting from the negligent operation, maintenance, or use of motor vehicles, or for the loss or damage to property (except property referred to in paragraph (3) of this subsection), or both. A registration remains in effect only as long as the registrant continues to satisfy the security requirements of this paragraph. *(Emphasis added).* The regulations, 49 C.F.R. §§ § 387.7, 387.9, 387.15, are in the appendix.

STATEMENT OF THE CASE

28 U.S.C.A. § 1331 confers district court jurisdiction and 28 U.S.C.A. §§ 1291 and 2106 invoke circuit court jurisdiction.

The respondent-insurer files a federal declaratory judgment action and names its insured trucking company and driver, A. G. Perry & Son, Inc. and Lester Donald Lamon, as defendants along with all claimants arising from the subject tractor-trailer/multiple-vehicle crashes. The district court grants summary judgment for the insurer and erroneously rules respondent has no liability beyond the combined single limit of $1,000,000.00 stated

in the body of its insurance policy. The involved statutes, regulations and required endorsement are erroneously treated by the district court as mere redundancies to the initial liability limits in the insurance policy.

Huckaby and Boyd's response to respondent's motion for summary judgment reveals Tammy Davenport is a commercial underwriter for the insurer. She identifies a BMC-90 endorsement to the involved policy. The federal government requires attachment of the BMC-90 endorsement to the policy for the truckers. The insurer intends to stand behind this endorsement. The BMC-90 endorsement has the same effect as a MCS-90 endorsement, and the BMC-90 is included and quoted in the summary judgment response of Huckaby and Boyd. (Vol. 2 page 383, page 380 lines 11-16, page 378 lines 5-16, page 377, page 376 lines 1, 13-22). The policy and BMC-90 endorsement are in effect on November 14, 1996, the date injuries, deaths and property damage arise in the subject crashes. (Vol. 1 pages 62, 46-47 Vol. 2 page 375 lines 19-22, page 371 lines 11-25, page 343). The insurer admits it insures the truckers and the involved tractor and trailer (Vol. 2 page 343).

Lamon leases his tractor to Perry, and the tractor pulls Perry's flatbed trailer. On November 14, 1996, Lamon drives this tractor-trailer rig on Highway 242. At the Houston Metroplex, he arrives at the intersection of 242 with an access road that is above and descends to U.S. Highway 59. This highway is a divided major traffic artery. For traffic, Highway 59 has two north lanes and two south lanes. It is dark and the evening rush hour. At that time, north and south traffic on 59 is always dense and fast. (Vol. 2 pages 288-286).

At the intersection above 59, and when he drives down the access road, Lamon sees this horrendous traffic on 59. From behind a stop sign, on the access road, Lamon moves his tractor into, and he stops it within, a crossover on 59. Lamon is forced to let the heavy northbound traffic, which he always observes, pass him. However, he leaves the trailer across, and it blocks, the southbound lanes of travel on 59. Donovan Paul Johnson, who is going south, drives a Toyota under the trailer. This kills Johnson and his passenger, Joshua Kyle Huckaby. Both are teenagers.

Afterwards, Louis W. Wyrick drives a van south on 59 that strikes the trailer. Wyrick suffers severe, permanent and catastrophic brain and other injuries. Subsequently, another car, driven south by Shelley Ann Brewer, skids to the right, narrowly misses the trailer, wipes out two state highway signs, and stops with its front facing north. Brewer suffers injuries. (Vol. 2 pages 288-286).

Rick Huckaby and Jeri Boyd, the father and mother respectively of Joshua Kyle Huckaby, file a wrongful death and survivorship action against Perry and Lamon. In their state court action, they plead their right to recover up to $1,000,000.00 for each of the separate judgments they wish to obtain against Perry and Lamon. During settlement negotiations, and when state trial and appellate proceedings take place, the insurer files and pursues its federal declaratory judgment action. And the insurer does this despite clear and controlling law, of the Fifth and other circuits, that construes the BMC90 endorsement against its contention in the lower courts. (Vol. 1 page 23).

The combined single limit of the policy is $1,000,000.00 for each accident. The BMC-90 endorsement, and the statutes and regulations negate these policy monetary limitations and single accident conditions. The insurer ignores them. During negotiations and depositions, its position is that the insurer will pay only $1,000,000.00 for all bodily injury and property damage claims arising from the crashes on November 14, 1996. According to the insurer, it is first come, first paid, and when $1,000,000.00 is gone, the policy is exhausted. (Vol. 2 pages 346-343 Vol. 3 page 373 lines 16-25 page 372 lines 8-11, 16-24).

However, by affidavit and testimony, its adjuster admits respondent pays $1,056,687.94, for bodily injury and property damage claims, to Louis Wyrick and his relatives, the parents of Donovan Johnson and Shelley Brewer. Payment records specifically state all payments are for bodily injury and property damage claims. There is no notation, in the payment stubs, that any payment is for settlement of the declaratory judgment action with third party claimants. All records state every payment is attributed to the specific insurance policy issued to Perry. And strangely, the insurer claims to quickly settle the property damage claims of Brewer and the Donovans, but it claims it does not pay the property damage of Wyrick. After these settlements, the insurer continues to furnish and pay for the defense of Perry and Lamon in the state trial and appellate court litigation with Huckaby and Boyd. (Vol. 2 page 348 Vol. 3 page 365 lines 3-16, pages 364-357).

In the trial court, respondent's position is monetary and one-accident limitations and conditions in the body

of the policy control and define its exposure. The policy also states all bodily injury and property damage resulting from continuous or repeated exposure to substantially the same conditions will be considered as resulting from one accident. In their responses to the insurers motions for summary judgment, Huckaby and Boyd correctly contend the BMC-90 endorsement is dominant, and it overcomes and negates monetary and one-accident policy limitations and conditions. The insurer must pay up to $1,000,000.00 for each judgment that Huckaby and Boyd obtain against Perry and Lamon. (Vol. 2 pages 449-398, 395-393, 391-355, 353-250).

REASONS TO ALLOW WRIT OF CERTIORARI

Fatalities from large truck crashes have increased from 4,918 deaths in 1995 to 5,374 deaths in 1998. The fatal crash rate for large trucks is 2.6 deaths per 100 million vehicle miles traveled – more than 50 percent greater than the rate for all vehicles on the road. Of 5,374 people killed in truck accidents in 1998, seventy-eight percent were occupants of another vehicle. In 1998, an additional 123,000 people are injured in accidents with large trucks. Large trucks are more likely to be involved in fatal multiple-vehicle crashes than are passenger vehicles – 84 percent of all large trucks in fatal crashes compared with 62 percent of all passenger vehicles. One out of eight traffic crash fatalities in 1998 is the result of collision(s) with a large truck. When it imposes adequate redress for injured members of the public on insurers for

truckers, Congress addresses a legitimate public policy question.[1]

Standard of Review. The operation and effect of the BMC-90 endorsement is a matter of federal law. *Canal Insurance Company v. First General Insurance Company,* 889 F.2d 604, 610 (5th Cir. 1989). State law and insurance contracts are preempted when they conflict with federal laws that occupy the field. *United States v. Locke,* 120 S. Ct. 1135, 1148-1152 (2000) and *Hines v. Davidowitz,* 312 U.S. 52, 66-67 (1941). The federal statutes, regulations and BMC-90 endorsement override the insurer's contention that monetary and single accident limitations and conditions, in the body of the policy, exhaust its obligations. By its express terms, this endorsement allows a recovery from the respondent of $1,000,000.00 for each judgment against Perry and Lamon. In its declaratory judgment action, the insurer does not meet its initial burden for it to be entitled to a summary judgment. As a matter of law, Huckaby and Boyd produce specific and material facts that preclude summary judgment for respondent. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). When there is more than one reasonable interpretation of an insurance contract, courts must construe it in favor of coverage. *National Union Fire v. Hudson Energy Company,* 811 S. W. 2d 552, 555 (Tex. 1991). Ambiguities in insurance contracts are strictly construed against insurers. *Sharp v. State Farm Fire and Casualty Company,* 115 F.3d

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[1] 1999 report of National Highway Traffic Safety Administration website *http://www.saferoads.org/facts/fs-trucks.html.*

1258, 1260-61 (5th Cir. 1997). This is especially so when dealing with exceptions and words of limitation. *Lubbock County Hospital District v. National Union Fire Insurance Company*, 143 F.3d 239, 242 (5th Cir. 1998).

The first paragraph of the BMC-90 endorsement expresses the intent of the United States Congress.

> "The policy to which this endorsement is attached is an automobile bodily injury and property damage liability policy and ***is amended to assure compliance by the insured*** as a motor carrier of passengers or property, ***with Section 10927, Title 49 of the United States Code and the pertinent rules and regulations of the Interstate Commerce Commission.***" *(Emphasis added).*

The 5th Circuit clearly construes the Motor Carrier Act of 1980, and the BMC-90 endorsement, to require insurers to pay all judgments that injured members of the public obtain against insured carriers and drivers. For example:

> "The decisions of this court indicate that the policy embodied in the statutes and regulations **was to assure that injured members of the public would be able to obtain judgments collectible against negligent authorized carriers.**" *Canal Insurance Company v. First General Insurance Company*, 889 F.2d 604, 611 (5th Cir. 1989). *(Emphasis added).*

> " . . . that policy . . . included the BMC-90 endorsement . . . **The endorsement requires an insurer to pay any judgment for a member of the injured public against an insured** regardless whether the insurance policy specifically covers the vehicle. The endorsement also provides that the insured **must reimburse the**

> **insurer for any payment made that the insurer would not have had to pay for but for the endorsement.**" *Industrial Indemnity Company v. Truax Truck Line, Inc.*, 45 F.3d 986, 988 (5th Cir. 1995). *(Emphasis added).*

In that circuit, a sister state court of appeals clearly and eloquently describes the purpose and effect of endorsements required by the Motor Carrier Act of 1980:

> "The purpose of the MCS-90 endorsement is **to protect the public against undercapitalized and underinsured motor carriers.** This endorsement provides that **the insurer will pay any final judgment recovered against the insured** from negligence in the operation of commercial motor vehicles. **The insurer has to pay** the injured party **despite a limitation or condition in the policy or endorsement stating otherwise.**" *Kaplan v. Harco National Insurance Company*, 716 So.2d 673-675 (Miss. App. 1998), *cert. denied* 726 So.2d 594 (Miss. 1998). *(Emphasis added).*

Another federal court of appeals construes the MCS-90 endorsement:

> "In the endorsement, the insurance company agreed to pay '**any final judgment recovered against the insured** for public liability resulting from negligence in the operation, maintenance or use' of any of its insured vehicles in interstate commerce. The insured, in turn, agreed to reimburse the insurance company for **all sums paid under the endorsement that the company would not have been required to pay absent the endorsement.**" *Redland Insurance Company v. Shelter General Insurance Companies*, 121 F.3d 443-445 (8th Cir. 1997). *(Emphasis added.).*

The Motor Carrier Act of 1980 does not limit the number of judgments insurers have to pay for their negligent truckers. It specifically states each judgment against carriers must be satisfied by insurers, up to the initial amount for security in the policy, and the minimal security that must be met is set by the act. In other words, Huckaby and Boyd may each collect from the insurer up to $1,000,000.00 for each judgment they obtain against Perry and Lamon. No more than $1,000,000.00 apiece can be collected because said sum is an initial amount in the body of the insurance policy. This is clear under 49 U.S.C.A. § 13906(a)(1):

> " . . . **The security must be sufficient to pay,** not more than the amount of security, **for each final judgment against the registrant** for bodily injury to, or death of, and individual resulting from the negligent operation, maintenance or use of motor vehicles . . . " *(Emphasis added).* See also 49 C.F.R. § 387.9.

And this is the ruling in *Empire Fire and Marine Insurance Company v. Guaranty National Insurance Company,* 868 F.2d 357 (10th Cir. 1989). Addressing the required endorsement, the 10th Circuit writes, at page 363:

> "A straightforward reading of the language suggests only **that it negates any clauses in the body of the policy** to which it is attached **that would have the effect of limiting that insurance carrier's liability.** That is, **it deletes limiting clauses in the policy to which it is attached,** but it does not **create new, additional obligations in the policy** . . . " *(Emphasis added)*

In its conclusion, and because the endorsement negates it, the courts read out the limiting language in the body of

the insurance policy. Thus, in this case, the combined single limit of $1,000,000.00, in the body of Perry's policy, is negated. However, Huckaby and Boyd may collect only $1,000,000.00 from the insurer, for each of their judgments, because this is the same monetary obligation in the body of the policy. *Empire Fire; supra,* at page 368.

The trial court's opinion cites the foregoing cases of the 5th and 10th Circuits, but the opinion erroneously fails to enforce the BMC-90 endorsement in favor of Huckaby and Boyd. (Vol. 3 page 465, opinion page 15). Shockingly, the 5th Circuit wrongfully refuses to enforce its prior and contra decisions that are directly on point. Said decisions, and the other cases cited in this petition, hold it is error to treat BMC-90 endorsement language as mere redundancy to limiting provisions in the body of the policy. The endorsement negates, and it reads out, monetary and each accident limitations and conditions in the body of the policy. It imposes obligations on the insurer to satisfy judgments Huckaby and Boyd may obtain against Perry and Lamon, which it would not face in the absence of the endorsement. The panel's decision directly conflicts with prior decisions of the 5th Circuit, and with cited opinions from other circuits, and the Supreme Court should resolve these conflicts.

No language in the endorsement itself may limit the insurer's liability to pay judgments Huckaby and Boyd obtain. However, the memorandum opinion misconstrues the BMC-90 to hold its endorsement language states that no more than the initial monetary limit of the policy is to be paid by the insurer. The endorsement itself states this is obvious error: "It is understood and agreed that no

condition, provision, stipulation, or limitation contained in the policy, or any other endorsement thereon or violation thereof, **or of this endorsement**, by the insured, **shall relieve the company from liability or from payment of any final judgment**, irrespective of the financial responsibility or lack thereof or insolvency or bankruptcy of the insured." *(Emphasis added).*

The same error is committed in *Hamm v. Canal Insurance Company*, 10 F. Supp.2d 539 (M.D.N.C. 1998) *affirmed* 178 F.3d 1283 (4th Cir. 1999). The Supreme Court should resolve the conflicts between circuit opinions about the subject statutes, regulations and required endorsements.

Perry has no obligation to reimburse the respondent for payment of the policy's initial limit of $1,000,000.00. If this is the case, why buy any insurance? However, the endorsement, and the statutes and regulations that require it, state Perry must reimburse respondent for the additional payments the insurer makes in excess of the policy's body limit of $1,000,000.00. Logically, for any reimbursement by Perry, the endorsement must then require additional payment by the insurer over and above the combined single monetary limit in its policy. This reasonable interpretation favors Huckaby and Boyd.

The insurance policy underinsures Perry. Injured members of the public are not compensated for the death of their loved one that is caused by the negligence of Perry's driver in multiple-vehicle-claimant crashes. The insurer challenges obligations that are imposed on it by the Motor Carrier Act of 1980. This case presents abuses that the Motor Carrier Act of 1980 addresses and which the act clearly intends to prevent. Since the judgment fails

to enforce the BMC-90 endorsement to the insurance policy, and refuses to correct abuses Congress intends to remedy, it must be vacated.

The Supreme Court is presented an important question of federal law that has not been, but should be, settled by it. And there is such a departure by the lower courts from clear and unambiguous federal statutory law and regulations, which they are required to enforce, that it calls for an exercise of this Court's supervisory power.

CONCLUSION

The BMC-90 endorsement amends the policy, reading out the combined single limit and one accident condition in the policy. Because the BMC-90 endorsement expressly authorizes it, Huckaby and Boyd may recover from the respondent up to $1,000,000.00 for each judgment they obtain against Perry and Lamon. The writ of certiorari should issue, and the judgment of the district court should be vacated and this case remanded for enforcement of the pertinent federal statutes, regulations and endorsements.

Respectfully submitted,

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APPENDIX

TABLE OF CONTENTS

1. Court of Appeals' Opinion and Judgment.. App. 1
2. District Court's Opinion and Judgment..... App. 8
3. Final Summary Judgment..... App. 35
4. Notice of Appeal.....App. 37
5. Court of Appeals' Order Denying Rehearing.. App. 39
6. Endorsement for Motor Carrier Policies, 49 U.S.C. § 10927..... App. 41
7. 49 C.F.R. 387.7, 387.9, 387.15..... App. 44

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-21008

PENNSYLVANIA GENERAL INSURANCE COMPANY,

Plaintiff-Counter Defendant-Appellee,

versus

A.G. PERRY & SON, INC., Et Al.,

Defendants,

versus

RICK HUCKABY; JERI BOYD,

Defendants-Counter Claimants-Appellants.

Appeal from the United States District Court
for the Southern District of Texas, Houston Division
H-97-CV-3839

(Filed Jul. 03, 2000)

Before JONES and BENAVIDES, Circuit Judges, and COBB,* District Judge.

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* District Judge of the Eastern District of Texas, sitting by designation.

PER CURIAM :**

This appeal presents issues arising out of a fatal traffic accident that occurred on November 14, 1996. Lester Lamon, driving a tractor/trailer rig which was then covered under a general insurance policy issued by Pennsylvania General Insurance Company (PGI) to A.G. Perry & Son, Inc. (P & S), the truck's owner, was attempting to complete a turn on U.S. Highway 59, in Texas. Before he could complete the turn into a crossover on the highway, two vehicles, one passenger car and one van, struck the trailer which was then blocking the southbound lanes of traffic. A third vehicle narrowly avoided the collision and instead struck several highway signs. The driver who hit the signs suffered minor injuries; the driver of the van suffered various injuries but survived the accident; the driver and the passenger of the third vehicle, Donovan Johnson and Joshua Huckaby respectively, were killed in the collision.

The insurance policy issued by PGI provided coverage up to $1,000,000 per "accident" for the term from August 1, 1996, to August 1, 1997. An "accident" under the terms of the policy is defined as "bodily injury and property damage resulting from continuous or repeated exposure to substantially the same conditions." Additionally, the policy contained an MPC-90 endorsement (referred to by the parties variously as a BMC-90 endorsement or a MCS-90 endorsement). This endorsement, as required by federal law, provides coverage to any final

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** Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

judgment recovered against P & S, regardless of whether the vehicle specifically involved in the accident was named in the policy. PGI, then, under the terms of the endorsement, is entitled to recover from P & S reimbursement for any payments made in accordance with the endorsement that were not otherwise payable under the terms of the policy.

This appeal concerns matters stemming from a lawsuit filed in state court by Joshua's parents, Rick Huckaby and Jeri Boyd, against Lamon and P & S which alleged Lamon to be at fault for Joshua's death. Donovan's parents also filed suit as did the driver of the van, Louis Wyrick. In response to this suit, PGI filed an action for declaratory judgment, in federal court, seeking to have the district court construe under federal law several provisions of the insurance contract now at issue. Specifically, PGI sought a determination that the claims of the respective defendants arose from but one accident and that its potential liability on those claims exceeded policy limits. PGI thus sought declaration that despite this potential liability, its maximum exposure under the insurance contract was the policy limit of $1,000,000. Huckaby and Boyd, in response, filed a counter-claim in district court seeking a declaration that PGI would be responsible, under the terms of the endorsement, for any final judgment against P & S.

The parties subsequently entered into settlement negotiations which later resulted in all parties, except Huckaby and Boyd, settling their claims for a total of $1,056,687.94. Huckaby and Boyd refused to participate in the settlement.

PGI then moved for summary judgment in the district court as to its declaratory action and with respect to Huckaby and Boyd's counterclaim. The district court granted that motion and entered final summary judgment for PGI on September 30, 1999.

Huckaby and Boyd now complain that the district court erred in finding, as stated in its Memorandum Opinion and order of the same date, that the incident of November 14, 1996, constitutes one accident or occurrence under the terms of the policy, thus the $1,000,000 policy limit applies to any and all claims arising out of that accident; and, further, that the district court erred in finding that the plain terms of the endorsement, when read in conjunction with the policy, mandates its application to the facts of this accident but presents no ambiguity where it states that it applies "within the limits of liability prescribed herein." Huckaby and Boyd maintain that error lies in the district court's conclusion, reasoned from these findings, that the endorsement is subject to the limits of the policy itself, and, as P & S had exhausted the policy limit by settling the various other claims against it, PGI has no further duty to defend or indemnify P & S against any claims arising from the November 14, 1996 accident.

This appeal presents no material factual disputes. Rather, Huckaby and Boyd dispute the district court's application of the relevant law to the facts of the case. Our careful review of the briefs and the applicable law, however, convinces us that the district court did not err in concluding that P & S had exhausted the limits of its insurance policy with respect to this accident, thus relieving PGI of any further duties. Therefore, for essentially

the reasons stated by the district court in its carefully reasoned memorandum opinion and Order entered September 30, 1999, we AFFIRM the judgment of the district court in all respects.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

CHARLES R. FULBRUGE III
CLERK

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NEW ORLEANS, LA 70130

July 3, 2000

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing or Rehearing En Banc

No. 99-21008 Pennsylvania Gen Ins v. A.G. Perry & Son Inc
USDC No. H-97-CV-3839

Enclosed is a copy of the court's decision. The court has entered judgment under FED. R. APP. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

FED. R. APP. P.'S 39 through 41, and 5TH CIR. RULES 35, 39, and 41 govern costs, rehearings, and mandates, **5TH CIR. RULES 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following FED. R. APP. P. 40 and 5TH CIR. R. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

Direct Criminal Appeals. 5TH CIR. R. 41 provides that a mention for a stay of mandate under FED. R. APP. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for *certiorari* in the United States Supreme Court, you do not need to file a motion for stay of mandate under FED. R. APP. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

The judgment entered provides that appellants pay to appellee the costs on appeal.

Sincerely,
CHARLES R. FULBRUGE III,
Clerk

By: /s/ Rhonda Flowers
Rhonda Flowers,
Deputy Clerk

Enclosure
Mr John Howard Thomisee Jr
Mr Henry Sim Platts Jr
Mr James Earl Simmons
Mr Frank L Supercinski
OPJDT-2

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

PENNSYLVANIA GENERAL INSURANCE COMPANY, Plaintiff, v. A.G. PERRY & SON, INC., LESTER DONALD LAMON, RICK HUCKABY, JERI BOYD, MICHAEL JOHNSON, KATHLEEN JOHNSON, AND LOUIS W. WYRICK, Defendants.	)	CIVIL ACTION NO. H-97-3839

MEMORANDUM OPINION AND ORDER

(Filed Sep. 30, 1999)

Pending before the Court are Plaintiff Pennsylvania General Insurance Company's Motion for Summary Judgment (Instrument #54) and Motion for Summary Judgment as to Huckaby and Boyd's Counterclaim (Instrument #55). Upon reviewing the record and considering the applicable law, the Court concludes that Plaintiffs Motion for Summary Judgment should be **GRANTED**, and that Plaintiffs Motion for Summary Judgment as to Huckaby and Boyd's Counterclaim should also be **GRANTED**.

I. BACKGROUND

The essential facts of this case are not in dispute. In

1996, Pennsylvania General Insurance Company (PGI) issued A. G. Perry & Son, Inc. (P & S) a general liability insurance policy ("the general policy"). The general policy provided business automobile coverage from August 1, 1996 to August 1, 1997 and had a $1,000,000 policy limit.

Defendants allege the facts as follows: On November 14, 1996, a tractor/trailer rig, driven by Lester Lamon and covered under the general policy, was involved in a multi-car accident. Lamon was attempting to turn the tractor/trailer rig into a crossover on U.S. Highway 59; during this turn, the trailer portion of the rig was blocking the southbound lanes of the highway. A southbound Toyota, carrying two passengers, struck and drove under the trailer. A southbound van also struck the rear of the trailer. Another southbound vehicle, an Oldsmobile, veered and skidded to miss the trailer and collided with some highway signs. The driver and passenger of the Toyota, Donovan Johnson and Joshua Huckaby, respectively, were killed. The driver of the van, Louis W. Wyrick, suffered various injuries. The driver of the Oldsmobile, Sally Brewer, is not a party to this suit.

Several claims arose out of this incident. Rick Huckaby and Jeri Boyd, the surviving parents of Joshua Huckaby, sued Lamon and P & S claiming Lamon to be at fault for the accident. Michael and Kathleen Johnson, the surviving parents of Donovan Johnson, likewise sued Lamon and P & S claiming Lamon to be the cause of the accident. Louis Wyrick, and various members of his family, also brought claims against Lamon and P & S. Together, all the claims were brought in Texas state court in the same case.

The general policy issued by PGI provided coverage up to $1,000,000 per "accident." "Accident" is defined in the policy as "bodily injury and property damage resulting from continuous or repeated exposure to substantially the same conditions." The policy also contained an NPC-90 endorsement. This endorsement gave coverage to any final judgment recovered against P & S, regardless of whether or not the vehicle involved in an accident was specifically named in the policy. According to the endorsement, P & S must then reimburse PGI for any payments PGI would not have been obligated to make except for the endorsement.

On November 21, 1997, PGI filed an action for declaratory judgment seeking to have this Court construe certain provisions of the general insurance policy issued to P & S. Specifically, PGI asks this Court to determine whether its potential liability exceeds what PGI believes to be the limits of the general policy with regard to Defendants' claims. PGI petitions the Court to declare that there was "but one accident" and that the maximum amount recoverable under the policy is "$1,000,000 regardless of the number of claims and/or claimants." Defendants Huckaby and Boyd filed a counterclaim, asking this Court to declare that PGI is responsible for any final judgment against P & S or that the November 14 collision was "a series of separate accidents."

Subsequent to the filing of the declaratory judgment action, the parties entered into settlement negotiations. The Wyricks' and the Johnsons' claims were settled at mediation in December of 1997. PGI paid a total of $1,056,687.94 to settle these claims. Huckaby and Boyd

were represented at the mediation; however, they refused to participate under the settlement.

On June 1, 1999, Plaintiff PGI filed a motion for summary judgment as to its declaratory action. It then moved for summary judgment as to Huckaby and Boyd's counterclaim as well. In its motions, PGI argues that the November incident involved only one accident, limiting the company's liability to $1,000,000. Because PGI has already settled up to the $1,000,000 policy limit, it argues that it now has no further duty to defend or indemnify P & S with regard to Huckaby and Boyd's claims. PGI also argues that the MPC-90 endorsement does not apply to the November 14 accident because the tractor/trailer was not involved in interstate commerce at the time of the incident; in the alternative, it argues that the endorsement does not expand the general policy's coverage. Finally, PGI contends that the $1,000,000 policy limit was not waived by its settlement in excess of the policy limit because it had submitted a reservation of rights letter before entering into settlement negotiations.

In response to PGI's summary judgment motions, Huckaby and Boyd contend that the MPC-90 endorsement attached to P & S's insurance policy is inconsistent with that policy, which should result in the Court construing the policy against PGI. Specifically, they point out, the endorsement obligates PGI to pay any final judgment recovered as a result of the November accident. Huckaby and Boyd also claim that PGI waived its policy limit by settling in excess of that amount, and thus PGI should be estopped from asserting the policy limit as a defense. Huckaby and Boyd also disagree with PGI's

contention that the November incident involved one accident.

P & S, PGI's insured, likewise responds to PGI's motions by asking the Court to determine there were multiple accidents and that the NWC-90 endorsement applies to the November accident.

II. STANDARD OF REVIEW

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is appropriate when the pleadings and record evidence show that no genuine issue of material facts exists and that, as a matter of law, the movant is entitled to judgment. *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir.1994). "[T]he substantive law will identify which facts are material." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Only disputes about material facts will preclude the granting of summary judgment. *Id.* In a motion for summary judgment, the burden is on the movant. *Latimer v. Smithkline & French Lab.*, 919 F.2d 301, 303 (5th Cir. 1990). If the non-movant bears the burden of proof at trial, however, the movant for summary judgment need not support the motion with evidence negating the opponent's case. Instead, the movant may satisfy its burden by showing that there is an absence of evidence to support the non-movant's case. *Id.; Little,* 37 F.3d at 1075.

Once the movant makes this showing, the burden shifts to the non-movant to show that summary judgment is not appropriate. *Little,* 37 F.3d at 1075 (citing *Celotex Corp. v. Catrett,* 477 U.S. 317, 325 (1986)). "This burden is not satisfied with 'some metaphysical doubt as to the

material facts,' . . . by 'conclusory allegations,' . . . by 'unsubstantiated assertions,' or by only a 'scintilla' of evidence." *Id.* (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, (1986); *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 871-73 (1990); *Hopper v. Frank*, 16 F.3d 92, 97 (5th Cir. 1994); *Davis v. Chevron U.S.A., Inc.*, 14 F.3d 1082, 1086 (5th Cir. 1994)). Rather, the non-moving party must "come forward with 'specific facts showing that there is a genuine issue for trial.' " *Matsushita*, 475 U.S. at 587 (quoting FED. R. CIV. P. 56(e)). In determining whether a genuine issue for trial exists, the court must view all of the evidence in the light most favorable to the non-movant. *Richter v. Merchants Fast Motor Lines, Inc.*, 83 F.3d 96, 98 (5th Cir. 1996) (per curiam); *Gremillion v. Gulf Coast Catering Co.*, 904 F.2d 290, 292 (5th Cir. 1990).

III. DISCUSSION

A. Interpretation of the Insurance Contract Generally

Interpretation of an insurance contract is a question of law. *Gararanty Nat'l Ins. Co. v. North River Ins. Co.*, 909 F.2d 133, 135 (5th Cir. 1990) (citation omitted). Because this case comes through diversity jurisdiction, Texas law controls the Court's interpretation of the PGI insurance policy. *See Canutillo Indep. Sch. Dist. v. National Union Fire Ins. Co.*, 99 F.3d 695, 700 (5th Cir.1996) (citing TEX. INS. CODE ANN. art. 21.42 (West 1981)).

When interpreting a contract, the Court's primary concern "is to ascertain and to give effect to the intentions of the parties as expressed in the instrument." *R & P Enter. v. LaGuarta, Gavrel & Kirk, Inc.*, 596 S.W.2d 517, 518

(Tex. 1980). To achieve this objective, the Court considers the contract as a whole. *See Forbau v. Aetna Life Ins. Co.*, 876 S.W.2d 132, 133 (Tex. 1994). When considered as a whole, a contract is ambiguous only if "it is reasonably susceptible to more than one meaning." *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983). But as Texas courts have recognized, "not every difference in the interpretation of a contract or an insurance policy amounts to an ambiguity." *Forbau*, 876 S.W.2d at 134. The Court will not find a contract ambiguous if it may properly give the contract a certain legal meaning or interpretation. *See CBI Indus.*, 907 S.W.2d at 520. Although the Court will construe ambiguities in an insurance contract against the insurer and in favor of coverage, *see National Union Fire Ins. Co. v. Hudson*, 811 S.W.2d 552, 555 (Tex. 1991), it will not " 'strain to find such ambiguities, if, in so doing, [it] defeats the probable intentions of the parties.' " *Sharp v. Federal Sav. & Loan Ins. Corp.*, 858 F.2d 1042, 1045 (5th Cir.1988) (quoting *Calcasieu-Marine Nat'l Bank v. American Employers' Ins. Co.*, 533 F.2d 290, 296 (5th Cir.1976)).

B. Definition of "Accident" Under the General Policy

The threshold issue before the Court is the definition of the term "accident" as it is used in the insurance policy that PGI issued to P & S. As mentioned above, the policy provided liability coverage up to $1,000,000 per "accident." This policy limit is a combined policy limit, covering bodily injury and property damage. In defining the term "accident," the policy states only that "bodily injury and property damage resulting from continuous or

repeated exposure to substantially the same conditions will be considered as resulting from one accident."

PGI correctly points out that there are no Texas cases nor Fifth Circuit cases (interpreting Texas law) with facts similar to the case at bar that interpret the term "accident." Thus, the Court "must make an *Erie* guess as to how the Texas Supreme Court would decide the issue." *H. E. Butt Grocery Co.*, 150 F.3d 526, 530 (5th Cir. 1998) (citing *Farm Credit Bank v. Guidry*, 110 F.3d 1147, 1149 (5th Cir. 1997)).

1. *Two general views as to what constitutes a single accident or occurrence*

Courts have adopted two general views as to what constitutes a single accident or occurrence.[1] *See* Michael P.

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[1] Although the insurance contract and endorsement in the instant case use the term "accident" rather than the term "occurrence," the Court notes that various writings on the issue have used the words synonymously in their analysis. *See, e.g.* Michael P. Sullivan, Annotation, *What Constitutes Single Accident or Occurrence within Liability Policy Limiting Insurer's Liability to a Specified Amount Per Accident or Occurrence*, 64 A.L.R. 4th 668 (1988). Nevertheless, Defendant P & S, in its response to Plaintiff's motion for summary judgment, argues that the term "occurrence" does not appear in the policy (only the word "accident"), and therefore any case law defining the word "occurrence" should be inapplicable to the Court's analysis in the instant case. Defendant focuses on a distinction that is devoid of a difference. The Court takes particular note of the fact that while the authoritative case law defines only the word "occurrence," the language of the insurance policies in those cases is overwhelmingly similar to the policy language used in the instant case. For example, in *Transport Ins. Co. v. Lee Way*

Sullivan, Annotation, *what Constitutes Single Accident or Occurrence within Liability Policy Limiting Insurer's Liability to a Specified Amount Per Accident or Occurrence*, 64 A.L.R. 4th 668 § 2(a) (1988) (discussing a causation approach and an effects approach to analyzing " 'occurrences' or 'accidents' "). The first view uses a cause-based analysis, in which courts determine the number of accidents or occurrences by looking at the cause of the accident or occurrence. *Id.* According to this theory, an event or process that has a single cause will be "deemed a single occurrence even though the injuries may be widespread in both time and place and may affect a multitude of individuals." *Transport Ins. Co. v. Lee Way Motor Freight, Inc.*, 487 F. Supp. 1325, 1330 (N.D. Tex. 1980). The second view uses an effects-based analysis, whereby courts determine the number of accidents or occurrences by looking at the individual outcomes of the occurrence or condition.

Motor Freight, 487 F. Supp. 1325 (N.D. Tex. 1980), the policy at issue defined an "occurrence" as a "happening or event or a continuous or repeated exposure to conditions which . . . result in personal injury during the policy period." *Id.* at 1329. As mentioned above, the policy of the instant case defines an "accident" as "bodily injury and property damage resulting from continuous or repeated exposure to substantially the same conditions." Clearly, the language defining "occurrence" in *Transport* and the language defining "accident" in the instant case express exactly the same conceptual principle. As a result, the Court finds the Fifth Circuit's analysis in cases such as *Transport* to be relevant and instructive.

2. *Courts in other jurisdictions use a cause-based analysis in accident cases*

While the two approaches are certainly recognized, "[t]he great majority of courts" determine the number of accidents by looking at the cause of the accident. *Id.* In fact, the Court notes that there are numerous cases, albeit from other jurisdictions, that have used the causation analysis to hold that a particular happening constituted one single accident. *See St. Paul Mercury Indem. Co. v. Rutland,* 225 F.2d 689 (5th Cir. 1955) (applying Georgia law) (using the cause analysis in a case involving a truck that collided with a freight train and derailed sixteen cars, and holding that the facts indicated one accident); *American Cas. Co. v. Heary,* 432 F. Supp. 995 (E.D. Va. 1977) (holding that there was one accident when a vehicle caused a chain reaction of accidents, based on the cause analysis); *Hyer Inter-Insurance Exch. Auto. Club,* 246 P. 1055 (Cal. App. 1926) (using the cause analysis to hold that there was but one accident when an insured's vehicle struck two separate automobiles head-on); *Farmers Ins. Exch. v. Star,* 952 P.2d 809 (Colo. Ct. App. 1996), *as modified on denial of reh'g,* (Aug. 21, 1997), *cert denied,* (Feb. 23, 1998) (holding that one accident was caused by two drivers under a cause theory); *Kansas Fire & Cas. Co. v. Koelling,* 729 S.W.2d 251 (Mo. App. 1987) (using the causation theory to hold that an insured's attempt to pass a vehicle, resulting in a collision with two vehicles, constituted one accident); *Hartford Accident & Indem. Co. v. Wesolowski,* 305 N.E.2d 907 (N.Y. 1973) (finding that there was but one occurrence when a vehicle struck an oncoming vehicle and ricocheted 100 feet and struck a second vehicle); *Truck Ins. Exchange v. Rohde,* 303 P.2d 659 (Was. 1956) (concluding that a situation in which one vehicle successively struck three motorcycles was one accident

based on cause); *Olsen v. Moore*, 202 N.W.2d 236 (Wis. 1972) (using the cause analysis to find that one vehicle striking two vehicles almost simultaneously was one accident). Throughout these cases, the courts based their analysis from the standpoint of the "conduct forming the causative act." *Liberty Mut. Ins. Co. v. Rawls*, 404 F.2d 880, 881 (5th Cir. 1968) (citing *St. Paul Mercury Indem. Co. v Rutland*, 225 F.2d 689 (5th Cir. 1955)).

3. *Texas state and federal courts use the cause analysis in other insurance contexts*

Texas state and federal courts have adopted the causation approach in insurance contexts other than automobile accidents. *See H.E. Butt v. Grocery Nat'l Union Fire Ins. Co. of Pittsburgh*, 150 F.3d 526, 530 (5th Cir. 1998) ("Texas courts agree that the proper focus in interpreting 'occurrence' is on the events that cause the injuries and give rise to the insured's liability, rather than on the number of injurious effects.")

The case of *Transport Ins. Co. v. Lee Way Motor Freight, Inc.*, 487 F. Supp. 1325 (N.D. Tex. 1980), for example, is highly instructive. That case involved a defendant motor freight company that was found to have "engaged in a pattern and practice of racial discrimination" and was ordered to pay over $1.8 million in damages to individual discriminatees. *Id.* at 1326. In a declaratory judgment action, the defendant's insurer asked the district court to determine whether the liability imposed on the defendant resulted from a single occurrence, a separate occurrence as to each of the four terminal locations involved, or a

separate occurrence as to each of the individual disciminatees. *Id.*

The insurance policy at issue in that case stated that the insurer was obligated to pay for "personal injuries . . . caused by or arising out of each occurrence happening anywhere in the world." *Id.* at 1327. The policy defined "occurrence" in much the same way that the policy in the instant case defines "accident": "a happening or event or a continuous or repeated exposure to conditions which unexpectedly and unintentionally results in personal injury. . . . " *Id.* at 1326.

The court in that case focused on the system-wide discrimination that permeated the defendant's operations and went on to hold that the "pattern and practice" of discrimination by the defendant constituted one single occurrence. *Id.* at 1327. In so doing, the court used a cause-analysis and focused on the policy's definition of the word "occurrence":

> The last sentence of the quoted definition [in the policy] establishes clearly that the pattern and practice of discrimination constituted "one occurrence." It states, that all exposure "to substantially the same general conditions" shall be deemed "one occurrence." The individual discriminatees were exposed to the same system-wide corporate policy of discrimination, albeit at different times and places. Yet, the language is clear in its intent that all exposure to the same conditions is deemed one occurrence. These words must be given their plain meaning and not construed in a technical or limited sense. It follows that all exposure to the pattern and practice of discrimination (*i.e.*, "substantially the

> same general conditions") must be deemed "one occurrence."

Id. at 1328 (citations omitted). In further support of its reasoning, the *Transport* court also cited the large body of analogous case law that has used a causation analysis. *See id.* at 1330. The more recent case of *H.E. Butt v. Grocery Nat'l Union Fire Ins. Co. of Pittsburgh*, 150 F.3d 526 (5th Cir. 1998), also used the same cause analysis in an insurance coverage dispute, but with a different result. The case involved an employee of an HEB grocery store who sexually abused two children on the store's premises. HEB sued its insurer, seeking a declaratory judgment to determine the coverage to which it was entitled.

Again, the insurance policy in that case attached liability to the term "occurrence." Similar to the policy in *Transport*, the *HEB* policy defined the term "occurrence" much in the same way that the policy in the instant case defines the term "accident": "all Personal Injury or Property Damage arising out of the continuous or repeated exposure to substantially the same general conditions shall be considered as arising out of one occurrence." *Id.* at 529.

The plaintiffs in that case argued that the two molestations constituted only one occurrence because it was HEB's negligent relationship with its pedophilic employee that caused the two molestations. The defendants argued that the molestations were separate occurrences because the employee engaged in two separate acts of sexual abuse, performed on different children and on different days.

In deciding how many occurrences took place from the two sexual assaults, the *HEB* court used a cause analysis to hold that the two sexual assaults amounted to two separate occurrences. While the facts of the *HEB* case are vastly different than those found in the instant case, the *HEB* court's methodology is relevant and instructive. The court primarily spoke in terms of a chain of causation: "While 'a single occurrence may result in multiple injuries to multiple parties over a period of time . . . [,] if one cause is interrupted and replaced by another intervening cause, the chain of causation is broken and more than one occurrence has taken place.' " *Id.* at 534 (citation omitted). The *HEB* court also went on to cite a Third Circuit case that held that to determine the number of occurrences " 'the court asks if "[t]here was but one proximate, uninterrupted, and continuing cause which resulted in all of the injuries and damage." ' " *Id.* (citing *Appalachian Ins. Co. v. Liberty Mut. Ins. Co.*, 676 F.2d 56, 61 (3rd. Cir. 1982)).

4. *Application of the relevant case law to the instant case*

When it comes to the facts of the instant case, the Court thus approaches this case using a causation analysis. This cause-based approach comports with both (1) the actual language of the general policy, which defines "accident" as injury or damage "resulting from continuous or repeated exposure to substantially the same conditions," and (2) the robust body of persuasive case law that has used the cause analysis in accident and other insurance cases.

Using the cause analysis, the Court will deem a situation that has single cause as one accident. The Court thus holds that the incident found in the present case, where a tractor/trailer spans the southbound lanes of a highway, thereby causing three cars to collide with it, constitutes one, single accident. Using the facts alleged by Defendants and the analytical framework provided by the Fifth Circuit in *HEB*, it is clear that the tractor/trailer driven by Lester Lamon was the single, "proximate, uninterrupted, and continuing cause" which resulted in the multiple injuries and damages sustained by Defendants. *Id.* (quotation omitted). But for the tractor/trailer spanning the southbound lanes of the highway, the collisions would not have occurred, and there were no separate intervening causes that produced each collision individually. Indeed, this surely must have been the basic tort theory that Defendants were arguing in state court in the underlying case. Based on the single cause of the tractor/trailer, the language of the general insurance policy, and persuasive and authoritative case law on the matter, the Court finds that the accident at issue was indeed one single accident.[2]

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[2] Despite Defendant P & S's arguments to the contrary, the Court does not find the word "accident" to be ambiguous. To the extent that the Court finds that "accident" is synonymous with "occurrence" in the instant case, it is important to note that the Fifth Circuit has held that the word "occurrence" is not ambiguous. In the *HEB*, a case in which an insurance policy defined "occurrence" in almost exactly the same way the policy in the present case defines "accident," the court stated: " This definition of 'occurrence' is virtually identical to the definition contained in standard-form commercial liability policies. Texas courts have routinely applied the term without concluding that

C. The MPC-90 Endorsement

Defendants, however, point to the MPC-90 endorsement that is attached to the general insurance policy. The endorsement, Defendant argues, obligates Plaintiff PGI to pay any final judgment recovered as a result of the accident. Furthermore, because the limit of the general insurance policy is inconsistent with the provisions of the endorsement, Defendants contend that the Court must construe the terms of insurance coverage against the insurer, PGI.

1. The applicability of the endorsement

The first issue with regard to the MPC-90 endorsement is its applicability in the instant case. The plaintiff insurer argues that the endorsement is inapplicable in the instant case because the tractor/trailer was not in interstate commerce at the time of the accident; however, Plaintiff fails to point to any endorsement provision or case law that supports that proposition. Rather, the actual language of the endorsement states that it applies to "motor vehicles *under certificate or permit issued to the insured by the Interstate Commerce Commission* [ICC], or otherwise in interstate or foreign commerce." The language of the endorsement itself, then, indicates that the tractor/trailer need have only been licensed or certified

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it is patently ambiguous. . . . We conclude that the definition of 'occurrence' in the policy is not ambiguous on its face." *HEB*, 150 F.3d at 529-30 (citations omitted). With regard to the term "accident," this Court holds likewise.

by the ICC for the endorsement to apply.[3] The record indicates that P & S, through its trucks, regularly engages in interstate commerce and is indeed licensed to do so.[4] There exists no evidence to the contrary. *See Carolina Cas. Ins. Co. v. Underwriters Ins. Co.*, 569 F.2d 304 (5th Cir. 1978) (holding that an endorsement applied in a situation where an ICC-certified truck backed out of the truck driver's driveway onto the right-of-way of an oncoming motorist). Thus, the MPC-90 endorsement applies in this case.

2. *The purpose and effect of the endorsement*

The second issue with regard to the endorsement is whether it contains coverage terms that are inconsistent with those of the general policy. Defendants argue that if the terms of the endorsement are inconsistent with the terms of general policy, then they must be construed against the plaintiff insurer.

The Court finds no inconsistency between the language of the general policy and the language of the

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[3] Effective January 1, 1996, the ICC was abolished and its duties were transferred to the Department of Transportation and the newly created Surface Transportation Board. *See* Pub. L. No. 104-88, 109 Stat. 803 (1995).

[4] George William Perry, the "son" in A.G. Perry & Son, Inc., testified to this effect in a deposition held in the underlying suit. When asked to describe the service area of his trucking business, Mr. Perry replied, "Texas, Louisiana, Mississippi, Oklahoma, and Arkansas, New Mexico *with the trucks*" (emphasis added). Defendant P & S does not claim that the tractor/trailer at issue was not licensed or certified to operate under ICC regulations.

endorsement. Of particular note is the fact that the MPC-90 endorsement specifically states that "all terms, conditions, and limitations in the policy to which this endorsement is attached are to remain in full force and effect. . . . " The endorsement also goes on to state, "In consideration of the premium stated in the policy to which this endorsement is attached, the [insurer] agrees to pay, *within the limits of liability prescribed herein,* any final judgment recovered against the insured for bodily injury to or death of any person . . . " (emphasis added). This language clearly indicates that the parties did not intend for the endorsement to overwrite the liability terms of the general policy. As one district court has held, an endorsement does not transform a motor carrier's insurance policy into a "surety bond" so as to allow "injured parties to seek recovery from the insurer for each and every final judgment recovered against an insured without regard for the liability limits stated within the policy." *Hamm v. Canal Ins. Co.*, 10 F.Supp.2d 539, 547 (M.D. N.C. 1998).

Rather, the endorsement is, in essence, a financial responsibility endorsement that every insurer must use pursuant to the Motor Carrier Act of 1980, 49 U.S.C. § 13906(a). *See Hamm*, 10 F. Supp.2d at 542 ("Every insurer must use this endorsement or equivalent language. By this endorsement the insurer promises to pay the full judgment up to the regulatory minimum."). The public policy behind the endorsement is to assure that negligent truckers could satisfy judgments against them brought by injured members of the public. *Industrial Indem. Co. v. Truax Truck Line, Inc.*, 45 F.3d 986, 992 (5th Cir. 1995)

(citing *Canal Ins. Co. v. First Gen. Ins. Co.*, 889 F.2d 604, 611 (5th Cir. 1989)).

To appreciate fully the purpose of the endorsement, one must look to the policy and language of the Motor Carrier Act of 1980, upon which the endorsement is based. Indeed, the first page of the endorsement in the instant case specifically states that it is intended to "assure compliance . . . [with] the pertinent rules and regulations of the Interstate Commerce Commission."

The purpose of an endorsement pursuant to the Motor Carrier Act is well explained in the case of *Empire Fire & Marine Ins. Co. v. Guaranty Nat'l Ins. Co.*, 868 F.2d 357, 363 (10th Cir. 1989):

> In the past, the use by truckers of leased or borrowed vehicles led to a number of abuses that threatened the public interest and the economic stability of the trucking industry. In some cases, ICC-licensed carriers used leased or interchanged vehicles to avoid safety regulations governing equipment and drivers. In other cases, the use of non-owned vehicles led to public confusion as to who was financially responsible for accidents caused by those vehicles.
>
> In order to address these abuses, Congress amended the Interstate Commerce Act to allow the ICC to prescribe regulations to insure that motor carriers would be fully responsible for the operation of vehicles certified to them.
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> . . . .
>
> Thus the ICC endorsement that is the subject of this appeal had its origin in the ICC's desire that the public be adequately protected when a

> licensed carrier uses a leased vehicle to transport goods pursuant to an ICC certificate.
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> . . . .
>
> A straightforward reading of the language suggests only that it negates any clauses in the body of the policy to which it is attached that would have the effect of limiting the insurance carrier's liability. That is, it deletes limiting clauses in the policy to which it is attached, but it does not create new, additional obligations in the policy . . .

Id. at 362-63 (citations and emphases omitted).

In order to assure compliance with the federal requirement for mandatory financial security, the Motor Carrier Act contains a form endorsement, specifically referred to as an MCS-90 endorsement, *see* 49 C.F.R. § 387.15, that mirrors the MPC-90 endorsement of the present case. The Court finds that the language of both the statute and the MPC-90 endorsement very clearly describes the insurer's obligations. With respect to the statute, it provides that "the security must be sufficient to pay, not more than the amount of the security." 49 U.S.C. § 13906(a)(1). The clear meaning of this statement is that whatever amount is to be paid will not exceed the amount of the security which has been established by the statute or by the policy itself.[5] This would mean that if

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[5] As of July 1, 1984, the Motor Carrier Act requires that a freight vehicle weighing more than 10,000 pounds and transporting non-hazardous property is required to have a minimum security of $750,000. 49 C.F.R. § 387.9. As noted above, Plaintiff insured P & S's tractor/trailer with a policy

the actual amount of the security is the minimum required by the statute, then the limit of potential liability for an insurer would be $750,000. However, if as in this case, the insured voluntarily elects to obtain security in a larger amount, such as $1 million, then that amount becomes the limits of potential liability for the insurer for claims resulting from a single accident. *See Hamm,* 10 F.Supp.2d at 544. Based on the language of the Act upon which the endorsement is based, the Court finds no inconsistency between the endorsement and the general policy with regard to the minimum amount of coverage.

There is also no inconsistency between the endorsement and the general policy with regard to the word "accident." As noted above, the general policy hinged liability coverage on "each accident." The MPC-90 endorsement also speaks in terms of coverage for an individual accident: "The Company's liability for the amounts provided in this endorsement apply separately to *each accident* and any payment under the policy because of *any one accident* shall not operate to reduce the liability of the Company for the payment of final judgments resulting from any other accident" (emphasis added). Moreover, although the MPC-90 endorsement does not define "accident," the Motor Carrier Act's MCS-90 form endorsement does. It defines "accident" in the same cause-based manner as the general policy, stating, "Accident includes continuous or repeated exposure to conditions which result in bodily injury [or] property damage. . . . " 49 C.F.R. § 387.15. This language supports the Court's finding that the insurer's potential liability

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limit of $1,000,000, which exceeds the statutory minimum.

for the amount of the security within the policy limits applies to a single accident regardless of the number of victims involved in that single accident. Thus, there is no inconsistency with regard to the scope of liability.

The present case does not evince, nor do Defendants point out, any clause in the body of the general policy that limits the insurer's liability in a way that is contrary to the policy behind the Motor Carrier Act.[6] Rather, P & S's insurance policy with PGI carries more liability coverage than the minimum required by the endorsement. Therefore, while the MPC-90 endorsement may apply to this case, it has no practical effect on the insurer's liability because Plaintiff already adequately complied with the endorsement's terms. The purpose of the endorsement, as seen in the statute that required it, is to make sure that trucks, even those that are leased, are covered by some minimum amount of insurance. *See Prestige Cas. Co. v. Michigan Mut. Ins. Co.*, 99 F.3d 1340, 1342 (6th Cir. 1996); *Empire Fire & Marine Ins. Co. v.*

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[6] Defendants in this case have not made the argument that the language of the general policy improperly attempts to limit liability by confining coverage to single accidents contrary to the Motor Carrier Act. The Court offers no finding on this issue, other than to point out that the Motor Carrier Act itself uses the phrase "each accident" as an illustration of an approved MCS-90 endorsement. 49 C.F.R. § 387.5. Moreover, as noted above, the MCS-90 form endorsement also defines "accident" from a causation standpoint, stating that the term "[a]ccident . . . includes continuous or repeated exposure to the same conditions resulting in public liability which the insured neither expected nor intended." *Id.* The Court would infer, then, that limiting liability to single accidents is consistent with the purpose and language of the Motor Carrier Act.

Guaranty Nat'l Ins. Co., 868 F.2d 357, 362-63 (10th Cir. 1989). The purpose of the endorsement is not to trump or to rewrite the terms of an insurance policy that already provides for the requisite level of coverage. *See id.* Thus, the MPC-90 endorsement in the instant case does not work to expand PGI's liability coverage.

D. Waiver and Estoppel

In their counterclaim, Defendants Huckaby and Boyd (the two non-settling defendants) argue, *inter alia*, that Plaintiff PGI waived its $1,000,000 policy limit when it settled with the other Defendants for "sums over its alleged policy limits." Ergo, according to Defendants, Plaintiff should be estopped from invoking the policy limit as a limitation on Plaintiffs insurance liability. PGI did pay P & S a total of $1,056,687.94 in a mediated settlement (thus settling the claims of Louis W. Wyrick and Michael and Kathleen Johnson). Defendants Huckaby and Boyd were represented at the mediation, but refused to participate in the pro-rata settlement.

The Court finds that PGI did not waive its policy limit by settling for an amount that exceeded the limit. First, Huckaby and Boyd fail to point to any case law that supports their proposition that an insurer necessarily waives a policy limit when that insurer settles for an amount that exceeds the limit.[7] Second, and more importantly, Plaintiff submitted a reservation of rights letter to

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[7] Huckaby and Boyd cite *Farmers Texas Cty. Mutual Ins. Co. v. Wilkinson*, 601 S.W.2d 520 (Tex. Civ. App. – Austin 1980, writ ref'd n.r.e.) to support their waiver/estoppel claim. That case specifically involved a dispute over whether an insurer was

P & S regarding Huckaby and Boyd's claims. The letter, dated May 21, 1997 (seven months before Plaintiff settled with the other defendants), clearly demonstrates Plaintiffs position with regard to the limits of its liability:

> [B]ased on the terms of the insurance policy, only one limit of $1,000,000 is applicable for all claims resulting from the accident. Pennsylvania General Insurance Company reserves its rights accordingly.
>
> The terms set forth herein may not be exhaustive, and Pennsylvania General Insurance Company reserves the right to rely upon any terms, exclusions, definitions, and/or conditions in its policy of insurance. No action on the part of Pennsylvania General Insurance Company or any of its agents or employees should be construed as a waiver of any such rights.

As the Fifth Circuit has recognized, "it is well-settled Texas law that 'the doctrines of waiver and estoppel cannot be used to create insurance coverage where none exists under the terms of the policy.' " *Pennsylvania Nat'l Mut. Cas. Ins. Co. v. Kitty Hawk Airways, Inc.*, 964 F.2d 478, 480 (5th Cir. 1992) (quoting *State Farm Lloyds Inc. v. Williams*, 791 S.W.2d 542, 550 (Tex. App. – Dallas, *reh'g denied*, 1990)); *see Farmers Texas Cty. Mut. Ins. Co. v. Wilkinson*, 601 S.W.2d 520 (Tex. App. – Austin, 1980) ("It is well established that [the doctrines of waiver and estoppel] will not operate to change, rewrite or enlarge the risks covered by

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obligated to assume the defense of an insured, and the rule for which the case is often cited addresses only that issue. The case does not speak to the issue of waiver/estoppel in disputes over policy limits.

the policy." (citations omitted)). Moreover, the exception to this general rule, articulated in *Farmers Texas Cty. Mut. Ins. Co. v. Wilkinson*, does not apply to the instant case. *Cf. id.* at 521-22 (stating that the general rule of no-expanded-coverage-through-waiver is trumped when, *inter alia*, an insurer assumes the insured's defense without declaring a reservation of rights or obtaining a non-waiver agreement); *Williams*, 791 S.W.2d at 550 (stating same).

Here, Huckaby and Boyd are essentially arguing that the doctrines of waiver and estoppel expand the general policy's liability beyond the scope of the policy's stated limits. The case law shows that an expansion of coverage is inappropriate when an insurer has reserved its rights. PGI did submit a reservation of rights letter to the Defendants, clearly indicating its position on the limits of coverage. The Court thus finds that PGI did not voluntarily surrender or waive the stated terms of the general policy.

E. Attorneys' Fees

In its motion for summary judgment, Plaintiff PGI seeks attorneys' fees from Defendant Huckaby and Boyd and asks that the Court allow Plaintiff to submit proof regarding its reasonable and necessary attorneys' fees. The Fifth Circuit has noted that the Federal Declaratory Judgment Act, 28 U.S.C. § 2202, does not itself independently authorize the award of attorneys' fees, while the Texas Declaratory Judgment Act, TEX. CIV. PRAC. & REM.. CODE § 37.001, does. *See Travelers Indem. Co. v. Citgo Petroleum Carp.*, 166 F.3d 761, 772 (5th Cir. 1999). However, the Fifth Circuit has also ruled that the Texas Act is procedural rather than substantive, and therefore it does not

authorize an award of costs in a federal court declaratory judgement diversity action. *See Utica Lloyd's of Texas v. Mitchell*, 138 F.3d 208, 210 (5th Cir.1998).

In the present case, Defendants Huckaby and Boyd not only have failed to challenge the appropriateness of attorneys' fees in this federal declaratory judgment action, but they have also requested them on their own behalf. Accordingly, the Court finds that, under the circumstances of this case, any argument against the award of attorneys' fees has been waived. The Court's determination on this matter is consistent with Fifth Circuit case law. *See Travelers*, 166 F.3d at 772 (holding that although the Texas Declaratory Judgment Act is procedural rather than substantive, the awarding of attorneys' fees in a federal diversity suit is nevertheless appropriate when both sides have requested said fees and have thus waived any arguments to the contrary). As a result, Plaintiff is free to submit proof of its reasonable attorneys' fees.

IV. CONCLUSION

Plaintiffs insurance policy indicates that a $1,000,000 policy limit applies per accident. The language of the policy, as well as the well-developed body of persuasive case law throughout the Fifth Circuit and other jurisdictions, indicates that the definition of "accident" should be determined through a cause analysis. Using this cause analysis, the Court finds that the multi-car incident involving Plaintiffs insured tractor/trailer constituted one single accident. Defendant P & S (the insured) has exhausted the $1,000,000 policy limit by settlement of

various claims against it; as such, PGI's duty to defend and duty to indemnify has ended. Moreover, the standard MPC-90 endorsement that is attached to Plaintiffs general policy does not enlarge or rewrite the limits of the policy; the two instruments are consistent with each other, and Plaintiff has already complied with both instruments' terms. Accordingly, the Court

ORDERS that Plaintiffs Motion for Summary Judgment is **GRANTED**;

ORDERS that Plaintiffs Motion for Summary Judgment as to Huckaby and Boyd's Counterclaim is **GRANTED**; and

ORDERS that Plaintiff may submit proof of its reasonable attorneys' fees.

SIGNED at Houston, Texas, this 30th day of September, 1999.

/s/ Melinda Harmon
MELINDA HARMON
UNITED STATES DISTRICT
JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

PENNSYLVANIA GENERAL INSURANCE COMPANY,	}	
Plaintiff,	}	
v.	}	CIVIL ACTION
A.G. PERRY & SON, INC., LESTER DONALD LAMON, RICK HUCKABY, JERI BOYD, MICHAEL JOHNSON, KATHLEEN JOHNSON, AND LOUIS W. WYRICK,	}	NO. H-97-3839
Defendants.	}	

FINAL SUMMARY JUDGMENT

In accordance with the Memorandum Opinion and Order of this same date, the Court hereby

ORDERS that Plaintiff Pennsylvania General Insurance Company is granted summary judgment on all claims brought by it in the above-referenced action against Defendants A.G. Perry & Son, Inc., Lester Donald Lamon, Rick Huckaby, Jeri Boyd, Michael Johnson, Kathleen Johnson, and Louis W. Wyrick;

ORDERS that Defendants Rick Huckaby and Jeri Boyd take nothing by way of their countersuit; and further

ORDERS that Defendants pay all costs of court.

THIS IS A FINAL JUDGMENT.

SIGNED at Houston, Texas, this 30th day of September, 1999.

/s/ Melinda Harmon
MELINDA HARMON
UNITED STATES DISTRICT
JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

PENNSYLVANIA GENERAL INSURANCE COMPANY,	:	
Plaintiff,	:	
V.	:	CIVIL ACTION NO. H-97-3839
A.G. PERRY & SON, INC., LESTER DONALD LAMON, RICK HUCKABY, JERI BOYD, MICHAEL JOHNSON, KATHLEEN JOHNSON, AND LOUIS W. WYRICK,	:	(Filed Oct 5, 1999)
Defendants.	:	

NOTICE OF APPEAL

TO THE HONORABLE JUDGE OF SAID COURT:

Notice is hereby given that Rick Huckaby and Jeri Boyd, defendants and counter-claimants, hereby appeal to the United States Court of Appeals for the Fifth Circuit from the final summary judgment signed in this action on September 30, 1999.

Respectfully submitted,

/s/ Frank Supercinski
FRANK L. SUPERCINSKI
State Bar No. 19516000
P.O. Box 189
Longview, Texas 75606
Telephone 903/236-0151
Facsimile 903/236-0118

ATTORNEY FOR HUCKABY/BOYD

CERTIFICATE OF SERVICE

I certify that on October 1, 1999, I mailed by first class U.S. Mail, correct postage prepaid, the foregoing Notice of Appeal to James E. Simmons, The Center, Suite 935, 8323 Southwest Freeway, Houston, Texas 77074 and to Jack W. Tucker, Jr., Attorney at Law, 8 Greenway Plaza, Suite 1200, Houston, Texas 77046, the last known addresses of the attorneys of record for plaintiff and A.G. Perry & Son, Inc.

/s/ Frank Supercinski
FRANK L. SUPERCINSKI

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-21008

PENNSYLVANIA GENERAL INSURANCE COMPANY

Plaintiff - Counter Defendant - Appellee

v.

A G PERRY & SON INC; ET AL

Defendants

RICK HUCKABY; JERI BOYD

Defendants - Counter Claimants - Appellants

Appeal from the United States District Court
for the Southern District of Texas, Houston

ON PETITION FOR REHEARING EN BANC

(Filed Aug. 2, 2000)

(Opinion 07/03/00, 5 Cir., ___, ___ F.3d ___)

Before JONES and BENAVIDES, Circuit Judges, and COBB,* District Judge.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R.

App. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
United States Circuit Judge

* District Judge of the Eastern District of Texas, sitting by designation.

CLERK'S NOTE:

SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

ENDORSEMENT FOR MOTOR CARRIER POLICES OF INSURANCE FOR AUTOMOBILE BODILY INJURY AND PROPERTY DAMAGE LIABILITY UNDER SECTION 10927, TITLE 49 OF THE UNITED STATES CODE

The policy to which this endorsement is attached is an automobile bodily injury and property damage liability policy and is amended to assure compliance by the insured as a motor carrier of passengers or property, with Section 10927, Title 49 of the United States Code and the pertinent rules and regulations of the Interstate Commerce Commission.

In consideration of the premium stated in the policy to which this endorsement is attached, the Company agrees to pay, within the limits of liability prescribed herein, any final judgment recovered against the insured for bodily injury to or death of any person, or loss of or damage to property of others (excluding injury to or death of the insured's employees while engaged in the course of their employment, and property transported by the insured, designated as cargo), resulting from negligence in the operation, maintenance, or use of motor vehicles under certificate or permit issued to the insured by the Interstate Commerce Commission, or otherwise in interstate or foreign commerce subject to Subchapter II, Chapter 105, Subtitle IV of Title 49 of the United States Code, regardless of whether or not such motor vehicles are specifically described in the policy and whether or not such negligence occurs on any route or in any territory authorized by the Interstate Commerce Commission to be served by the insured or elsewhere.

It is understood and agreed that no condition, provision, stipulation, or limitation contained in the policy, or any other endorsement thereon or violation thereof, or of this endorsement, by the insured, shall relieve the Company from liability or from the payment of any final judgment, irrespective of the financial responsibility or lack thereof or insolvency or bankruptcy of the insured. However, all terms, conditions, and limitations in the policy to which this endorsement is attached are to remain in full force and effect as binding between the insured and the Company, and the insured agrees to reimburse the Company for any payment made by the Company on account of any accident, claim, or suit involving a breach of the terms of the policy, and for any payment that the Company would not have been obligated to make under the provisions of the policy except for the agreement contained in this endorsement.

It is understood and agreed that, upon failure of the Company to pay any final judgment recovered against the insured as prescribed herein, the judgment creditor may maintain an action in any court of competent jurisdiction against the Company to compel such payment.

The Company's liability for the amounts provided in this endorsement apply separately to each accident and any payment under the policy because of any one accident shall not operate to reduce the liability of the Company for the payment of final judgments resulting from any other accident.

The liability of the Company on each motor vehicle shall be the limits prescribed in 49 CFR 1043.2 (b)(1), governing minimum amounts of insurance.

This endorsement may not be canceled without notification to the Commission. Such cancellation may be effected by the Company or the insured giving thirty (30) days' notice in writing to the Interstate Commerce Commission at its office in Washington, D.C., said thirty (30) days' notice commencing from the date notice is received by the Commission.

Issued to A.G. Perry & Son, Inc. of 620 Moore Avenue, Lufkin, TX 75901

Dated at Dallas, TX this 2nd day of August, 1996

Amending Policy No. BA 0253615 Effective Date 8-1-96

Name of Insurance Company Pennsylvania General Insurance Co.

Countersigned by /s/ [Illegible]
Authorized Company
Representative

49 C.F.R. § 387.7 Financial responsibility required.

(a) No motor carrier shall operate a motor vehicle until the motor carrier has obtained and has in effect the minimum levels of financial responsibility as set forth in § 387.9 of this subpart.

(b)(1) Policies of insurance, surety bonds, and endorsements required under this section shall remain in effect continuously until terminated. Cancellation may be effected by the insurer or the insured motor carrier giving 35 days' notice in writing to the other. The 35 days' notice shall commence to run from the date the notice is mailed. Proof of mailing shall be sufficient proof of notice.

(2) *Exception.* Policies of insurance and surety bonds may be obtained for a finite period of time to cover any lapse in continuous compliance.

(3) *Exception.* Mexican motor carriers may meet the minimum financial responsibility requirements of this subpart by obtaining insurance coverage, in the required amounts, for periods of 24 hours or longer, from insurers that meet the requirements of § 387.11 of this subpart. A Mexican motor carrier so insured must have available for inspection in each of its vehicles copies of the following documents:

(i) The Certificate of Registration;

(ii) The required insurance endorsement (Form MCS-90); and

(iii) An insurance identification card, binder, or other document issued by an authorized insurer which specifies both the effective date and the expiration date of

the temporary insurance coverage authorized by this exception.

Mexician motor carriers insured under this exception are also exempt from the notice of cancellation requirements stated on Form MCS-90.

(c) Policies of insurance and surety bonds required under this section may be replaced by other policies of insurance or surety bonds. The liability of the retiring insurer or surety, as to events after the termination date, shall be considered as having terminated on the effective date of the replacement policy of insurance or surety bond or at the end of the 35 day cancellation period required in paragraph (b) of this section, whichever is sooner.

(d) Proof of the required financial responsibility shall be maintained at the motor carrier's principal place of business. The proof shall consist of –

(1) "Endorsement(s) for Motor Carrier Policies of Insurance for Public Liability Under sections 29 and 30 of the Motor Carrier Act of 1980" (Form MCS-90) issued by an insurer(s);

(2) A "Motor Carrier Surety Bond for Public Liability Under Section 30 of the Motor Carrier Act of 1980" (Form MCS-82) issued by a surety; or

(3) A written decision, order, or authorization of the Interstate Commerce Commission authorizing a motor carrier to self-insure under § 1043.5 of this title, provided the motor carrier maintains a satisfactory safety rating as determined by the Federal Highway Administration under part 385 of this title.

(e) The proof of minimum levels of financial responsibility required by this section shall be considered public information and be produced for review upon reasonable request by a member of the public.

(f) All vehicles operated within the United States by motor carriers domiciled in a contiguous foreign country, shall have on board the vehicle a legible copy, in English, of the proof of the required financial responsibility (Form MCS-90 or MCS-82) used by the motor carrier to comply with paragraph (d) of this section.

(g) Any motor vehicle in which there is no evidence of financial responsibility required by paragraph (f) of this section shall be denied entry into the United States.

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49 C.F.R. § 387.9 Financial responsibility, minimum levels.

The minimum levels of financial responsibility referred to in § 387.7 of this subpart are hereby prescribed as follows:

SCHEDULE OF LIMITS – PUBLIC LIABILITY

Type of carriage	Commodity transported	Jan. 1, 1985
(1) For-hire (in interstate or foreign commerce, with a gross vehicle weight rating of 10,000 or more pounds).	Property (nonhazardous)	$ 750,000
(2) For-hire and Private (in interstate, foreign, or intrastate commerce, with a gross vehicle weight rating of 10,000 or more pounds).	Hazardous substances, as defined in 49 CFR 171.8, transported in cargo tanks, portable tanks, or hopper-type vehicles with capacities in excess of 3,500 water gallons; or in bulk Division 1.1, 1.2, and 1.3 materials, Division 2.3, Hazard Zone A, or division 6.1, Packing Group 1, Hazard Zone A material; in bulk division 2.1 or 2.2; or highway route controlled quantities of a Class 7 material, as defined in 49 CFR 173.403.	5,000,000
(3) For-hire and Private (in interstate or foreign commerce, in any quantity; or in intrastate commerce, in bulk only; with a gross vehicle weight rating of 10,000 or more pounds).	Oil listed in 49 CFR 172.101; hazardous waste, hazardous materials, and hazardous substances defined in 49 CFR 171.8 and listed in 49 CFR 172.101, but not mentioned in (2) above or (4) below.	1,000,000
(4) For-hire and Private (in interstate or foreign commerce, with a gross vehicle weight rating of less than 10,000 pounds).	Any quantity of Division 1.1, 1.2, or 1.3 materials; any quantity of a Division 2.3, Hazard Zone A, or Division 6.1, Packing Group 1, Hazard Zone A material; or highway route controlled quantities of a Class 7 material as defined in 49 CFR 173.403.	5,000,000

§ 387.15 Forms.

Endorsements for policies of insurance (Illustration I) and surety bonds (Illustration II) must be in the form prescribed by the FHWA and approved by the OMB. Endorsements to policies of insurance and surety bonds shall specify that coverage thereunder will remain in effect continuously until terminated, as required in § 387.7 of this subpart. The continuous coverage requirement does not apply to Mexican motor carriers insured under § 387.7(b)(3) of this subpart. The endorsement and surety bond shall be issued in the exact name of the motor carrier.

ILLUSTRATION I

Form MCS-90 (3/82)

Form Approved

OMB No. 2125-0074

ENDORSEMENT FOR MOTOR CARRIER POLICIES OF INSURANCE FOR PUBLIC LIABILITY UNDER SECTIONS 29 AND 30 OF THE MOTOR CARRIER ACT OF 1980

Issued to _____

of _____

Dated at _____

this _____ day of _____, 19 __

Amending Policy No. _____

Effective Date _____

Name of Insurance Company _____

Countersigned by _____

Authorized Company Representative

The policy to which this endorsement is attached provides primary or excess insurance, as indicated by "X", for the limits shown:

[ ] This insurance is primary and the company shall not be liable for amounts in excess of $_____ for each accident.

[ ] This insurance is excess and the company shall not be liable for amounts in excess of $_____ for each accident in excess of the underlying limit of $_____ for each accident.

Whenever required by the FHWA or the ICC the company agrees to furnish the FHWA or the ICC a duplicate of said policy and all its endorsements. The company also agrees, upon telephone request by an authorized representative of the FHWA or the ICC, to verify that the policy is in force as of a particular date. The telephone number to call is: _____

Cancellation of this endorsement may be effected by the company or the insured by giving (1) thirty-five (35) days notice in writing to the other party (said 35 days notice to commence from the date the notice is mailed, proof of mailing shall be sufficient proof of notice), and (2) if the insured is subject to the ICC's jurisdiction, by providing thirty (30) days notice to the ICC (said 30 days notice to commence from the date the notice is received by the ICC at its office in Washington, DC).

DEFINITIONS AS USED IN THIS ENDORSEMENT

Accident includes continuous or repeated exposure to conditions which results in bodily injury, property damage, or environmental damage which the insured neither expected or intended.

Motor Vehicle means a land vehicle, machine, truck, tractor, trailer, or semitrailer propelled or drawn by mechanical power and used on a highway for transporting property, or any combination thereof.

Bodily Injury means injury to the body, sickness, or disease to any person, including death resulting from any of these.

Environmental Restoration means restitution for the loss, damage, or destruction of natural resources arising out of the accidental discharge, dispersal, release or escape into or upon the land, atmosphere, watercourse, or body of water, of any commodity transported by a motor carrier. This shall include the cost of removal and the cost of necessary measures taken to minimize or mitigate damage to human health, the natural environment, fish, shellfish, and wildlife.

Property Damage means damage to or loss of use of tangible property.

Public Liability means liability for bodily injury, property damage, and environmental restoration.

The insurance policy to which this endorsement is attached provides automobile liability insurance and is amended to assure compliance by the insured, within the limits stated herein, as a motor carrier of property, with sections 29 and 30 of the Motor Carrier Act of 1980 and the rules and regulations of the Federal Highway Administration and the Interstate Commerce Commission (ICC).

In consideration of the premium stated in the policy to which this endorsement is attached, the insurer (the company) agrees to pay, within the limits of liability described herein, any final judgment recovered against the insured for public liability resulting from negligence in the operation, maintenance or use of motor vehicles subject to the financial responsibility requirements of sections 29 and 30 of the Motor Carrier Act of 1980 regardless of whether or not each motor vehicle is specifically described in the policy and whether or not such negligence occurs on any route or in any territory authorized to be served by the insured or elsewhere. Such insurance as is afforded, for public liability, does not apply to injury to or death of the insured's employees while engaged in the course of their employment, or property transported by the insured, designated as cargo. It is understood and agreed that no condition, provision, stipulation, or limitation contained in the policy, this endorsement, or any other endorsement thereon, or violation thereof, shall relieve the company from liability or from the payment of any final judgment, within the limits of liability herein described, irrespective of the financial condition, insolvency or bankruptcy of the insured. However, all terms, conditions, and limitations in the policy to which the endorsement is attached shall remain in full force and effect as binding between the insured and the company. The insured agrees to reimburse the company for any payment made by the company on account of any accident, claim, or suit involving a breach of the terms of the policy, and for any payment that the company would not have been obligated to make under the provisions of the

policy except for the agreement contained in this endorsement.

It is further understood and agreed that, upon failure of the company to pay any final judgment recovered against the insured as provided herein, the judgment creditor may maintain an action in any court of competent jurisdiction against the company to compel such payment.

The limits of the company's liability for the amounts prescribed in this endorsement apply separately to each accident and any payment under the policy because of any one accident shall not operate to reduce the liability of the company for the payment of final judgments resulting from any other accident.

Supreme Court, U.S.
FILED
DEC 11 2000
CLERK

(2)

No. 00-571

In The

Supreme Court of the United States

RICK HUCKABY and JERI BOYD,

Petitioners,

v.

PENNSYLVANIA GENERAL INSURANCE COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

HENRY SIM PLATTS, JR.
Counsel of Record
BAIR & WELSCHER, P.C.
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Suite 600
Houston, Texas 77060
(713) 862-5599

Attorney for Respondent Pennsylvania General Insurance Company

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29(6), the following are the parent corporations and publicly held companies that own 10% or more of Respondent Pennsylvania General Insurance Company's stock:

1. General Accident Insurance Company (Respondent's new name since August, 1999)

2. CGU Corporation (Respondent's parent corporation)

3. CGU Holdings LLC (a parent corporation of 2.)

4. CGU International Holdings Luxembourg S.A. (a parent corporation of 2.)

5. CGU International Holdings B.V. (the parent corporation of 4.)

6. CGU Group B.V. (the parent corporation of 5.)

7. Commercial Union International Holdings Limited (the parent corporation of 6.)

8. Scottish Insurance Corporation Limited (the parent corporation of 3. and 7.)

9. CGU Insurance plc (the parent corporation of 8.)

10. CGU International Insurance plc (the parent corporation of 9.)

11. General Accident plc (the parent corporation of 10.)

12. CGNU plc (the parent corporation of 11., publicly traded on the London Stock Exchange)

TABLE OF CONTENTS

Page

Corporate Disclosure Statement i

Table of Contents ii

Table of Authorities iii

Reasons for Denying the Writ 1

I. Neither the Record Nor the Decision Below Raise the Question Presented by the Petition 2

II. The Fifth Circuit's Ruling Does Not Conflict with Either 49 U.S.C. § 13906(a)(1) or the Authorities Cited in the Petition 4

A. The Ruling Does Not Contravene 49 U.S.C. § 13906(a)(1) 4

B. The Ruling Does Not Conflict with the Authorities Cited 5

III. The Fifth Circuit's Ruling Does Not Have Far-Reaching Implications 7

Conclusion 8

TABLE OF AUTHORITIES

Page

CASES:

Canal Ins. Co. v. First Gen. Ins. Co., 889 F.2d 604 (5th Cir. 1989) 5

Empire Fire & Marine Ins. Co. v. Guaranty Nat'l Ins. Co., 868 F.2d 357 (10th Cir. 1989) 5, 6

Hamm v. Canal Ins. Co., 10 F. Supp.2d 539 (M.D. N.C. 1998), *aff'd per curiam*, 178 F.3d 1283 (4th Cir. 1999) 7

Industrial Indem. Co. v. Truax Truck Line, Inc., 45 F.3d 986 (5th Cir. 1995) 5

Prestige Cas. Co. v. Michigan Mut. Ins. Co., 99 F.3d 1340 (6th Cir. 1996) 6

STATUTES:

49 U.S.C. § 13906(a)(1) 3, 4, 5

49 U.S.C. § 31139(b) 4

REGULATIONS:

49 C.F.R. §§ 387.1-387.17 4

49 C.F.R. § 387.7 4

49 C.F.R. § 387.9 4

49 C.F.R. § 387.15 ..... 2, 3, 4

REASONS FOR DENYING THE WRIT

The sole question presented by the Petition is whether federal law requires that each claimant in a multi-claimant accident with a motor carrier may recover from the motor carrier's liability insurer at least the minimum dollar amount of liability insurance mandated by federal statutes and regulations regardless of the stated "per accident" policy limit which meets or exceeds the required minimum. Petitioners argue the Fifth Circuit's opinion improperly holds that Petitioners are not entitled to pursue collection of an additional $1,000,000 from Respondent because Respondent has already paid other claimants its per accident policy limit of $1,000,000 in settlements, which exceeds the required $750,000 minimum limits.

According to Petitioners, such a holding conflicts with the requirements of federal statutes and regulations mandating minimum limits of financial responsibility for motor carriers of property, and existing decisions stating the general purpose of those statutes and regulations. However, the Fifth Circuit's opinion does not conflict with the relevant statutes, regulations or other courts' decisions. The purported conflict does not exist, and arises only from Petitioners' ignoring relevant portions of the cited statutes and regulations, and quoting statements of the general purpose of those statutes and regulations from other opinions in cases which did not present the issue here.

Under the facts of the present case, the Fifth Circuit's ruling was proper in all respects, as it followed the express language of the policy, the regulations, and the

only published opinion to consider the issue presented. Accordingly, Respondent respectfully requests the Court to deny the Petition.

I. Neither the Record Nor the Decision Below Raise the Question Presented by the Petition

This is a straight-forward contract interpretation case, and does not present the federal issue set forth in the petition. The issue in this case is simply the effect of the following language contained in the federally-mandated MPC-90 endorsement[1] attached to the liability insurance policy issued by Respondent:

> In consideration of the premium stated in the policy to which this endorsement is attached, the Company agrees to pay, *within the limits of liability prescribed herein*, any final judgment recovered against the insured for bodily injury to or death of any person . . . resulting from negligence in the operation, maintenance, or use of motor vehicles under certificate or permit issued to the insured by the Interstate Commerce Commission [now the Department of Transportation], or otherwise in interstate or foreign commerce . . . regardless of whether or not such motor vehicles are specifically described in the policy. . . .
>
> . . . .

---

[1] The MPC-90 endorsement is apparently an old form no longer in use. In the Petition, Huckaby and Boyd mistakenly label the endorsement "BMC-90." The current endorsement is Form MCS-90, Illustration I to 49 C.F.R. § 387.15 (Pet. App. 48-52), and contains substantially the same text as the MPC-90.

> *The Company's liability for the amounts provided in this endorsement apply separately to each accident* and any payment under the policy because of one accident shall not operate to reduce the liability of the company for the payment of final judgments resulting from any other accident.
>
> The liability of the Company on each motor vehicle shall be the limits prescribed in 49 CFR 1043.2 (b)(1) [now 49 C.F.R. § 387.303], governing minimum amounts of insurance.

Pet. App. 41, 42 (italic emphasis added).

Petitioners argue the "any final judgment" language in the first-quoted paragraph of the endorsement means the policy's per accident limit of liability is unenforceable. However, Petitioners wilfully ignore the "within the limits of liability prescribed herein" language which modifies the "any final judgment language" and, inexplicably, further ignore the endorsement's later qualification of those limits, to wit: "[t]he Company's liability for the amounts provided in this endorsement apply separately to *each accident*." Pet. App. 42 (italic emphasis added).

Substantially the same language is contained in the current approved Form MCS-90 endorsement in 49 C.F.R. § 387.15. Pet App. 51, 52. As section 387.15 was prescribed by the Secretary of Transportation pursuant to the authority granted him or her by 49 U.S.C. § 13906(a)(1), the Fifth Circuit's holding applying that language as written does not conflict with the applicable federal statutes or regulations, or with any other decisions which are factually on point.

II. The Fifth Circuit's Ruling Does Not Conflict with Either 49 U.S.C. § 13906(a)(1) or the Authorities Cited in the Petition

A. The Ruling Does Not Contravene 49 U.S.C. § 13906(a)(1)

Under section 13906(a)(1) of the Motor Carrier Act of 1980, the Secretary of Transportation may register a motor carrier only if it files security in such an amount as the Secretary prescribes pursuant to section 31139. 49 U.S.C. § 13906(a)(1). Under section 31139(b), the Secretary must prescribe regulations to require minimum levels of financial responsibility for transporting property of at least $750,000. 49 U.S.C. § 31139(b). As directed by section 31139(b), the Secretary has prescribed those required regulations under 49 C.F.R. §§ 387.1-387.17.

Pursuant to 49 C.F.R. § 387.7(a), a motor carrier of property must obtain the minimum level of financial responsibility prescribed in 49 C.F.R. § 387.9. Pet. App. 44. Under section 387.9, the minimum level of financial responsibility required for transporting non-hazardous property is $750,000, mirroring the requirement of 49 U.S.C. § 13906(a)(1). Pet. App. 46, 47. Pursuant to 49 C.F.R. § 387.15, a motor carrier may comply with section 387.7(a) by obtaining a policy of liability insurance containing a Form MCS-90, set out in full as Illustration I to section 387.15. Pet. App. 48-52. That form contains essentially the same language as the MPC-90 endorsement at issue in this case.

Based on the plain meaning of the language contained in the endorsement, the minimum liability insurance required by the MPC-90 endorsement is expressly

subject to the applicable per accident policy limit. That language was authorized by the Secretary of Transportation under the authority expressly granted to him or her under 49 U.S.C. § 13906(a)(1). Thus, the Fifth Circuit's ruling enforcing the express language of the policy does not conflict with section 13906(a)(1) as Petitioners contend.

B. The Ruling Does Not Conflict with the Authorities Cited

In their attempt to manufacture a federal issue, Petitioners quote portions of discussions of the general purpose of the MPC-90 endorsement from cases which did not present the same issue as here. Petitioners erroneously contend their chosen quoted language means the per accident policy limit must be ignored and the insurer's liability under the policy is limitlessly extended beyond the stated policy limit by way of the MPC-90 endorsement.

The MPC-90 endorsement is a financial responsibility endorsement. The public policy behind the endorsement is to assure that injured members of the public would be able to satisfy judgments against negligent truckers. *Canal Ins. Co. v. First Gen. Ins. Co.*, 889 F.2d 604, 611 (5th Cir. 1989); *Industrial Indem. Co. v. Truax Truck Line, Inc.*, 45 F.3d 986, 992 (5th Cir. 1995). As pointed out by the District Court, the purpose of the endorsement was well explained in the case of *Empire Fire & Marine Ins. Co. v. Guaranty Nat'l Ins. Co.*, 868 F.2d 357 (10th Cir. 1989):

> In the past, the use by truckers of leased or borrowed vehicles led to a number of abuses

> that threatened the public interest and the economic stability of the trucking industry. In some cases, ICC-licensed carriers used leased or interchanged vehicles to avoid safety regulations governing equipment and drivers. In other cases, the use of non-owned vehicles led to public confusion as to who was financially responsible for accidents caused by those vehicles.
>
> In order to address these abuses, Congress amended the Interstate Commerce Act to allow the ICC to prescribe regulations to insure that motor carriers would be financially responsible for the operation of vehicles certified to them.
>
> . . . .
>
> Thus the ICC endorsement that is the subject of this appeal had its origin in the ICC's desire that the public be adequately protected when a licensed carrier uses a leased vehicle to transport goods pursuant to an ICC certificate.

Id. at 362-63; Pet. App. 26, 27.

Thus the statute and regulations spawning the MPC-90 endorsement were intended to negate any policy language limiting coverage only to vehicles actually owned by a certified motor carrier. They were not intended to subject a motor carrier's insurer to unlimited liability beyond the minimum required per accident policy limits. *See also Prestige Cas. Co. v. Michigan Mut. Ins. Co.*, 99 F.3d 1340, 1342 (6th Cir. 1996).

By its own language the endorsement states the federally-required minimum limit applies on a per accident basis. The only published decision to consider the precise issue presented here enforced the endorsement as written

and correctly held that the language of the MPC-90 endorsement does not transform a liability insurance policy into an open-ended surety bond requiring payments in excess of the policy limit. *Hamm v. Canal Ins. Co.*, 10 F. Supp.2d 539 (M.D. N.C. 1998), *aff'd per curiam*, 178 F.3d 1283 (4th Cir. 1999) (unpublished table decision).

III. The Fifth Circuit's Ruling Does Not Have Far-Reaching Implications

This case does not present the far-reaching implications Petitioners contend. To the contrary, the regulations and the subject endorsement plainly and clearly announce their intent, and the existing decisions are consistent with that language and settled. Only were the Court to grant review and change the law to adopt Petitioners' position would there be far-reaching, negative implications.

If Petitioners were correct, a liability insurer who issued a $750,000 per accident minimum limits policy to a motor carrier later involved in a multi-fatality accident with a school bus carrying 50 children, for example, would be liable not for $750,000, but for $37,500,000. Such open-ended liability would be fraught with problems, not the least of which would be the impossibility of calculating and collecting sufficient premiums from policyholders to allow the insurers of the nation's motor carriers to operate solvently.

CONCLUSION

For the foregoing reasons, Respondent Pennsylvania General Insurance Company respectfully requests the Court to deny the Petition.

Respectfully submitted,

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